83-1463

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO.

MIRIAM BILLINGS LEDESMA,
Petitioner

v.

STATE OF GEORGIA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

J.M. RAFFAUF
Attorney for Petitioner
1477 Snapfinger Road
Decatur, Georgia 30032
(404) 288-0289

QUESTIONS PRESENTED

1) Whether OCGA 16-14-7(f) facially violates the Fourth and Fourteenth Amendments to the United States Constitution because it delegates to the police officers executing a search warrant unbridled discretion to search for and seize anything they choose to seize and whether there exists any exception to the Fourth and Fourteenth Amendments that authorizes the seizure of personal papers without a specific warrant or probable cause.

2) When evidence is seized pursuant to search warrants and where the issuing magistrate testifies that all the search warrants were based upon the wiretaps, alleged to be illegal, does the Fourth Amendment require that the validity of the wiretaps be established.

3) Whether the Petitioner was denied a full and fair opportunity to litigate her Fourth Amendment claims by allowing the state to forego its burden of proof on the searches and seizures, by not requiring the state to make the search warrants and the supporting documentation part of the record and by invoking the theory of collaterol estoppel even though a previous hearing on the September 14, 1982 search was in a different case, involved only one defendant and did not establish or even mention how the items admitted here were seized.

4) Whether the Fourth and Fifth Amendments permit, through any good faith exception or otherwise, a search subsequent to a warrantless arrest that is based only upon a teletype saying the defendant was "wanted" for questioning

where the arresting police knew there was no warrant, no pending charges, nor probable cause to arrest, and whether the subsequent search was legal.

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SUPREME COURT OF GEORGIA

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered on January 5, 1984, affirming the Petitioner's conviction for conspiracy to sell cocaine.

OPINIONS BELOW

The Petitioner and her co-defendant were convicted by a jury on February 11, 1983 and sentenced to ten years in the penitentiary for conspiracy to violate Schedule II (cocaine) of the Georgia Controlled Substances Act (R 151, T 42)*. The decision of the Supreme Court of Georgia affirming their conviction was entered on January 5, 1984 and is set forth in Appendix A. The decision is reported at 252 Ga. _____(1984). Petitioner Ledesma's Motion for Rehearing was dismissed and is set forth in Appendix B and is unreported.

JURISDICTION

The judgment of the Supreme Court of Georgia, affirming the conviction was

entered on January 5, 1984. Jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in crises arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

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*References to the record are referred to as (R); the trial transcript as (T); the motions hearings as (M); and the reports Motion to Suppress hearing as (MT).

persons be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecution, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OCGA 16-14-7(f) provides:

Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within 30 days of receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

STATEMENT OF THE CASE

After conviction by a jury on February 11, 1983 the Petitioner was

sentenced to ten years in the penitentiary for conspiracy to violate Schedule II of the Georgia Controlled Substances Act (R-151,T-42).* The indictment charged that five people, including the Petitioner "did unlawfully conspire to violate Schedule II of the Georgia Controlled Substances Act by joining among themselves and others to sell cocaine and certain members of such conspiracy did sell cocaine in violation of Schedule II of the Georgia Controlled Substances Act" (R-3). The indictment alleged the conspiracy took place between June 22, 1982 and October 22, 1982 (R-3).

This case involves four separate search and seizures as well as a series

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*References to the record are referred to as (R); the trial transcript as (T); the motions hearings as (M); and the separate Motion to Suppress transcript as (MT)

of challenged wiretaps. As a result of a search of Ledesma's person and automobile on September 14, 1982 the State obtained and introduced at trial as S-17,18 and 19 a calculator, a tape with figures on it and a list of names of persons that Ledesma allegedly sold drugs to (T-152, 153). The Petitioners filed a pre-trial motion to suppress (R-63) and a Motion to Adopt the Motions of Co-defendants (R-63,125).

This search had been the subject of a prior motion to suppress in another case involving Defendant Ledesma(M-34). The court refused to make the State put on any evidence or otherwise prove the legality of the search, instead allowing into evidence the transcript of the previous hearing (M-41). The Petitioners objected on the grounds that the prior case did not

establish the law of this case and that it denied them their rights of confrontation and counsel of choice (M-41). Moreover the prior case did not even mention the calculator, tape or drug ledger.

Although the State entered the transcript of the earlier hearing, it did not tender a copy of the teletype nor other supporting documentation relied upon by the officers in effecting the arrest.

The evidence showed and the State conceded that there never was a warrant in any state for Ledesma at the time of her arrest on September 14, 1982 (MT-29). Nor was Ledesma, at the time of her arrest "charged in the courts of a state with a crime" (MT-29). The trial court upheld the arrest because it found the officers made it in good faith because it was reasonable to believe that the

Defendant was charged in the courts of another state, and it was reasonable to believe a warrant had issued (MT-143-146).

On the morning of September 14,1982, Detective Norton* received a teletype from St. Louis, Missouri, which he admitted said only that the defendant was "wanted" and not that here was an outstanding warrant (MT-30). The teletype said:

"Hillsdale Police Department 091482 Attn Det Norton and Det Miller Fulton County PD Wanted subjects for Hillsdale PD Auth Sgt Brackney 2269 Pupo Jesus Cuban Male - Age 43 - DOB 120238 HT 510-wgt 220 Bld Hvy-Skin Drk-Eyes Bro-Hair Blk-Soc 265218219 R Add 714 Hileah Fl 090582Wnt Fel Violation Mo Controlled Substance Law Sal

*Three officers participated in this case: Detectives Norton and Miller of Fulton County and Officer Hernandez of the Atlanta Police Department. Although Norton denied any one of the three was in charge of this case (MT-47), Norton was the senior officer (MT-127). Furthermore, Miller thought Norton to be in charge (MT-127).

RS 195020 413040 3599 Alias Jesus Pupo Mesa OCA 82-566 061582 Ledesma Miriam Age 37-DOB 090643-POB Atlanta Ga HT 502-Wgt 1400Bld Hvy-Skin Med-Eyes Bro-Hair Blk SOC 257682131-R Add 4031 Eisteria Lane Atlanta 052980 Alias Mildred Edmonds Miriam Billings Miriam Ann Billings Wnt Fel Violation Mo Controlled Substance Law Sale OCA 82-566 061582 RS 195020 413040 3599 Oper Gordon EOMR"

Norton said he was expecting the teletype because "On the day before, I received a telephone call from Sgt. Brackney, St. Louis County, I believe, advising that they were issuing warrants for her. I advised him to either send us a warrant or teletype confirming that." (MT-32). All the officers who testified had been involved in a three and one-half month investigation involving the Defendant (MT-88). Although Norton said he was expecting the teletype, Norton did not know any details of the charges and only that it was for some drug

violation (MT-55). Officer Hernandez thought it had something to do with missing persons (MT-97). After Norton received the teletype, neither he, nor his fellow officers, made any attempt to call St. Louis County officials nor did they make any attempt to verify or check the teletype (MT-39). Although he got the teletype at 8:30 or 9:00 a.m. on September 14, he did not make any attempt to pick up the Defendant until 6:30 or 7:00 p.m. (MT-52). Norton admitted he was never told warrants were issued for the Defendant (MT-6). In fact, he called St. Louis County after the arrest, and the officials there still did not tell him there was a warrant (MT-60).

Brackney, called by the defense, specifically stated that he never had a

warrant and never told any law enforcement agency or any of the officers here involved that he had a warrant (MT-102). He stated he told Norton on September 14, 1982, that he had a "wanted." (MT-103). Norton denied having any conversations with Brackney on September 14, 1982. When asked "Did you tell him (Norton) that you had a warrant on the 13th or 14th," Brackney responded, "No." (MT-116). Brackney stated that the purpose of the wanted was so that Ledesma could be picked up in Atlanta and he could come down and talk with her (MT-115). In fact he did come to Atlanta on either the 15th or 16th of September, but Ledesma decided not to talk so he never obtained a warrant (MT-106,112,113). In fact, Brackney had driven to Atlanta previously when told by these same officers that Ledesma would

give a statement (MT-104). But Ledesma refused then, on August 30, 1982, to give Brackney a statement (MT-104).

The defense also subpoenaed and called Mark Miller, from the St. Louis County prosecutor's office, who testified that the police department issued a wanted for the Defendant, explaining:

> "Now, basically, we have what's known as a Hold Twenty in St. Louis County before a warrant is issued. We really require that the defendant be arrested and the police officers talk to them about the particular charges that are issued. Then in that twenty hour period, subsequent to their arrest, their discussions with a particular defendant, we reach a decision whether or not to issue warrants, arrest warrants, complaints, whatever." (MT-135).

Miller testified that at the time Ledesma was picked up by the Fulton County police officials that Ledesma was not charged in the Courts of Missouri (MT-137). In fact, Miller had expressly made a decision that a warrant would not issue

against this Defendant (MT-134).

Although the teletype had been received that morning, the officers waited until approximately 6:30 p.m. to effect Ledesma's arrest because they had other business (MT-34). The officers went to her residence but she was not there (MT-34). They then went to her mother's house where they "passed her at her mother's house (MT-54). Instead of stopping her there, they followed her one and one-half miles to McDonald's on Martin Luther King Drive (MT-34). Norton said the first thing they did was: "We advised her that we had arrest papers for her." (MT 35).

Norton said they first searched Ledesma and placed her in the police car: "Detective Hernandez, who's a female, searched her person. Then we placed her in the car." (MT-40). Hernandez testified:

"We put her hands on the top to the rear of our unmarked car. I searched her and placed her in the back seat of the unmarked car." (MT-79). Norton said Ledesma was standing beside the police car when she was searched (MT-40, 41). At the time she was searched, Ledesma was not trying to run away or get into her car, Norton said (MT-42). After placing her in the police car, they then searched her car (MT-40). Hernandez said that while she was searching Ledesma, the other officers were searching the car (MT-80).

Norton did not say at what point he searched the pocketbook. Norton said he personally found the gun, but couldn't remember where he found it. He admitted the gun had been under the front seat or in the back seat area (MT-44). "I just can't for sure say the front seat is where

I'm trying to say it was." (MT-45). The gun was in a closed black colored pouch (MT-35). Norton admitted that he couldn't tell if the pouch had a weapon in it except by feeling it: "You could hold it and feel the weapon." (MT-45).

Although the car was searched at the time of Ledesma's arrest, Norton made a decision to impound the car (MT-36). He impounded the car because: "They was several items in the car that our rules and regulations, our standard operating procedures requires that we put those in safekeeping when we impound a car." (MT-36). Norton said the car was impounded pursuant to a Fulton County Police Department Standard Operating Procedure (SOP) rule that says "When we arrest someone on private property that we impound the vehicle and take their personal belongings into safekeeping" (MT-37).

Norton cited an undated SOP Rule 23.3(D)(1)(d) stating cars will be towed on all arrests when: "The driver or owner of a vehicle is arrested and has parked the vehicle on private property: the arresting officer has the authority to remove said vehicle for impoundment and safekeeping." (MT-163). But the same SOP also states: "If the person in charge of said vehicle prefers, he may leave the auto at the scene of the incident providing it can be parked next to the curb or out of the roadway in a manner not creating a hazard to other traffic." (MT-162).

The trial court ruled that this search was a good faith search because it was done pursuant to an "official policy" of the police department (MT-144). The trial court admitted the SOP was conflicting

and contradictory on this point (MT-158). The trial court also upheld the search based on evidence not in the record: "As I say, I don't know where it appears from this evidence this investigation was much wider than this one case. I think the record shows. I'm aware of that. I don't know what has been said here. I'm taking into consideration that for what it's worth." (MT-158).

Norton said he ordered the car impounded but did not ask Ledesma what she wanted done with the car or ask her what wrecker service she wanted to tow the car (MT-48). While Norton said he did not check the vehicle registration to ascertain the owner (MT-48), he admitted that he knew the car was registered to the Defendant and her husband (MT-48, T-56). He also knew the Defendant had just left her

mother's, knew where her mother lived, only one and a half miles from the scene of the arrest (MT-34). Norton answered yes to the question: "It's your testimony, then, that you impounded the vehicle for only that reason, for the reason you felt like you had to secure the personal items and valuables in the car, is that your testimony?" (MT-49). No where was it stated where and when the calculator, tape, and drug ledger was found. Moreover the ledger & tape were "personal papers.

Although the State never used at trial any of the wiretap evidence, the judge who issued three separate search warrants testified he relied upon the evidence contained in the wiretaps to support the search warrants (T-259). The decision of the Georgia Supreme Court did not even address this issue. The wiretap

affidavits themselves showed that each new application rested upon the previous application (R65,125). The court overruled the motions (T-237,285), specifically finding that the wiretaps were legal and thus not a basis for suppressing physical evidence seized as a result of these searches (T-285). This ruling was limited to the last two wiretaps and the evidence obtained therefrom (T-285), as the State advised the court it would not use any evidence from the first wiretaps (T-285). The record shows clearly the state put on no evidence to support the legality of the first two sets of wiretaps.

There were three searches which were the fruits of the wiretaps. The first was the October 24 search of Ledesma's motel room (T-242,250). The second was

the October 24, 1982 search of Wes Mer Chemical Company that yielded personal papers and traces of cocaine (T-244, 336-353). The third search was the October 25 search of the private residence of Merritt and his office on Gordon Street (T-246, 280) that yielded certain documentary evidence which the State used in its attempt to link the Petitioners and Wes Mer Chemical Company (T-280, S-9-23).

The Petitioners specifically challenged the sufficiency of the affidavits to support wiretap authorization and challenged whether the information was in fact correct (T-238). The wiretaps were also alleged to be illegal in that they were not properly sealed (T-218). Not only were they not properly sealed but the State made copies of the wiretap docu-

ments after they were ordered sealed and without the permission of the court (T-225). In fact, there never was a court order authorizing publication of the tapes (T-236).

There were search warrants procured for the three other searches which were authorized by the issuing judge, which the state claimed were issued, pursuant to OCGA 16-4-17(f) which ostensibly authorizes general searches for personal papers (T-259). In fact, personal papers were seized in each of the three searches and were entered into evidence (T-265,269,270,277,280). The Petitioners filed pre-trial motions attacking the constitutionality of the statute (R-126,127). Even though the case was not brought under OCGA 16-14-1 et seq., the court overruled the motion (M-72,73)

and allowed the evidence in at trial over objection (T-285,286). These papers were used to link the Petitioners and Wes Mer Chemical Company, where traces of cocaine were found (T-244). The personal papers included another "drug ledger" an employment contract, stock certificates and calendars with personal notes.

These three searches were conducted pursuant to warrants, all of which were challenged (R 63,125) and subsequently upheld by the trial court (T-242,250,280, 295, 336-353). But the State did not put into the Record copies of any of these warrants, nor their accompanying affidavits or other supporting documentation.

REASONS FOR ALLOWING THE WRIT

I. THE DECISION BELOW, UPHOLDING GENERAL SEARCHES AND SEIZURES INVOLVING NUMEROUS "PRIVATE PAPERS" CONFLICTS WITH DECISIONS OF THE COURT AND THE FACIAL ATTACK ON THE GEORGIA STATUTE IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The statute under attack delegates to the police officers executing a search unbridled discretion to seize any property he "has probable cause to believe will be subject to forfeiture and will be lost or destroyed if not seized." Thus, the statute not only violates the Fourth Amendment's specificity and particularity requirements, it constitutes on impermissible delegation of magisterial duty and function of determining, in advance, questions of probable cause and setting out the permissible scope of the evidence to be seized.

The statute then, authorizes the executing officer not only to determine probable cause but to dispense with pre-search determination of specificity and particularity. This Court held almost eight years ago that the warrant must describe the property to be seized with sufficient specificity and particularity, so that nothing is left to the discretion of the executing officer. Marron v. United States 275 U.S. 192, 196, 48 S.Ct. 74 (1927). Where the warrant invites discretion, it fails for lack of specificity and is classified as general. See Mascolo, Specificity requirements for warrants Under the Fourth Amendment: Defining the Zone of Privacy, 73 Dick. L. Rev. 1, 5-6 (1968).

This court has already granted

Certiorari on the exact same issue as is presented here. See Waller v. Georgia Case NO. 83 - 321, cert. granted 11/07/83.

The Fourth Amendment was enacted in reaction to the evils of the general warrant and outlawed it. Warden v. Hayden, 387 U.S. 294, 87S. 1642 (1967). The RICO statute, which Georgia's statute follows, has been interpreted to authorize the seizure of "all items of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds...it might be anything from gardening equipment to cookbooks." Western Business Systems v. Slaton, 492 F. Supp. 513 (N.D. Ga. 1980). The Supreme Court has long held that statutes authorizing arrest and search on less than a warrant or probable cause are unconstitutional. See

Camara v. Municipal Court, 387 U.S. 523, 528, 87 S.Ct. 1727 (1978). "It is clear, of course, that no act of Congress can authorize a violation of the Constitution." Almeida-Sanchez v. United States, 413 U.S. 266, 272, 93 S.Ct. 2535 (1973). Detentions and searches pursuant to statutes, but without probable cause and a warrant, are unconstitutional, and render the statutes unconstitutional. United States v. Shaefer, 637 F.2d 200, 204 (3rd Cir. 1980).

Nothing is to be "left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. at 196. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." Coolidge

v. New Hampshire, 403 U.S. at 462. Thus OCGA 16-14-7 (f) unconstitutionally delegates to police officers the judicial function of determining probable cause and the scope of the search. "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principal that searches conducted outside the judicial process without prior approval (by a judge or magistrate) are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925).

This case was not prosecuted under the RICO statue and since the state has foregone prosecution under the RICO statute it should not be allowed to reap whatever benefits the statute may

allow had it a right to do what it did not.

Nor does the evidence seized here fit within any well-delineated exception to the rule that searches conducted outrides the judicial process without prior approval are per se unreasonable under the Fourth Amendment. Carroll, supra. The search here was a general search. The warrants here authorized a search for "drugs and drug paraphenalia". Armed with these warrants the executing officers embarked on an unconstitutional fishing expedition. As the Supreme Court of Georgia found: "These papers consisted of a ledger reciting two drug transactions; two desk calendars recounting drug transactions and the name of a drug courier; deposit slips for Wes-Mer Chemical Company found

at Petitioner Merritt's real estate business; a business license of Wes-Mer Chemical Company; and an employment contract between a third party and Wes-Mer Chemical Company " (Slip Opinion page 7) (Appendix 16a). All the warrants claimed the items sought to be seized were on the person of either Merritt or Ledesma or in their respective offices and Wesley Merritt's home. Among the items seized from the person of Ms. Ledesma the October 24, 1982 return said "From the pocket book misc. papers and telephone address books." From Merritt they seized a "manila envelope marked Mr. Merritt (misc papers)(sic)" and "desk calendar (from the desk of Wesley Merritt)". The officers read Ledesma's notebook found in her desk (T339).

At trial the district attorney said "I stipulate that every item... the officer made the decision whether or not it was seizable, not Judge Etheridge." (T276).

The search warrants issued here were not general warrants on their face. The things to be discovered were described with particularity. The question is whether the search that was conducted, either under the auspices of the statute or some other exception to the Fourth Amendment, was not confined to its lawful scope and became general. Had the issuing judge been informed of the true reason for the warrant request and the scope of the search contemplated, he might have approved it, subject to explicit limitations on the scope of discovery to prevent an overly

intrusive search. But the officers whether relying on the statutes sweep or some other exception, disclosed no such information, arrogating to themselves the magisterial function of setting out the dimensions of the search. And because this was a general search everything seized should be suppressed if the exclusionary rules' deterent principle is to have any practical meaning. Cf. Kremen v. United States, 353 U.S. 346, 77 S.Ct. 88 (1957)

It is of course not the rule that only evidence uncovered during a search must invariably be described in the warrant before it may be seized. Where evidence is uncovered during a search pursuant to a warrant the threshold question must be whether the search was confined to the warrants' terms. It

may not be a general exploratory search. Gurelski v. United States, 405 F2d 253, 258 (5th Cir. 1968). As executed here the warrant became an instrument for conducting a general search. Under the circumstances, it was not possible to identify after the fact the distinct items of evidence which might have been discovered had the officers kept their search within the bounds permitted by the warrant; and therefore all evidence seized during this search under the auspices of this statute and warrant should have been suppressed.

The validity of the scope of the search depends, generally, upon the reasonableness of the search in light of its purpose. Ker v. California, 374 U.S. 23, 33, 83 S.Ct. 1623 (1963).

A search which is initially valid may violate the Fourth Amendment because of "its intolerable intensity and scope." Terry v. Ohio, 392 U.S. 1, 18, 88 S.Ct. 1868 (1968). Accordingly, it has been held unreasonable to search and seize a defendant's files. United States v. Kleefield, 275 F. Supp. 761 (S.D. N.Y. 1967). In Marron v. United States, supra, the Court held that a "ledger showing inventories of liquor, receipts, expenses, including gifts to police officers" could not be lawfully seized pursuant to a warrant. The mere fact that the articles seized are later found to be incriminating does not validate the search. Johnson v. State, 111 Ga. App. 298 (1965). "Probable cause cannot be measured by hindsight." Cook v. State, 134 Ga. App. 712, 716 (1975).

II. THE DECISION OF THE COURT BELOW IN FAILING TO SUPPRESS EVIDENCE SEIZED FROM ALL THE SEARCH WARRANTS IN THIS CASE WHICH WERE ALL BASED ON ADMITTEDLY ILLEGAL WIRETAPS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE FOURTH AMENDMENT AND SO FAR DEPARTS FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURTS' DISCRETION.

At trial the state abandoned any attempt to establish the validity of the first two of the five sets of wiretaps. (T210) The trial judge declined to rule on the first two sets based on the states assertion they would not introduce these wiretaps into evidence (T211). But the state also admitted that the subsequent wiretaps which were admitted and used were the fruit of the first two wiretaps (T214). The Judge who issued the three search warrants in this case said he relied on all the wiretaps (which he had in fact issued) in authorizing the search warrants. Two of the affidavits in support of the

search warrants signed by the officers specifically cited the wiretaps to establish probable cause. Even the Georgia Supreme Court found that: "It is not disputed that electronic surveillance was used to gather information which, in part, established probable cause for the warrants used to execute these searches." (Slip Opinion page 6, App. 14a). Nevertheless that court incredibly found that : "As Appellants concede no wiretaps evidence was admitted at trial, we find no error." (Slip Opinion page 7, App. 16a).

At the hearing on a motion to suppress the wiretaps and the fruits of the wiretaps, the burden of proof is upon the State. Cox v. State, 152 Ga. App. 453 (1979). The Defendant contends that the State here did not meet its burden be-

cause it never even attempted to show the validity of the initial wiretap, instead abandoning that evidence and relying on the fruits of the later wiretaps. But the evidence procured through the wiretaps that was used at trial was the fruit of the original wiretaps. See Wong Sung v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

The State violated Section 8 of OCGA 16-11-64 (Ga. Code Ann. 26-3004) in that the State failed to properly seal the wiretaps and published them. The Petitioners also attacked all the wiretaps on the grounds that probable cause was not shown and the statements contained therein were conclusory and pretextual. See Berger v. New York, 388 U.S. 41, 81 S.Ct. 1873 (1967). To render the wiretaps legal all the requirements of OCGA

16-11-60 et seq. must be followed. United States v. White, 401 U.S. 745, 91 S.Ct. 1122 (1971); State v. Tooney, 134 Ga. App. 343 (1975).

Nor did the State make a proper showing of the necessity before the issuance of wiretap authorization. See 18 U.S.C.A. Section 2510 et seq. These federal statutes must be complied with to render the wiretaps legal. Cox v. State, 152 Ga. App. 483 (1979). 18 U.S.C. 2510-2520.

III. THE RULINGS AND HEARINGS ON THE VARIOUS MOTIONS TO SUPPRESS IN THIS CASE WERE NEITHER FULL NOR FAIR, AND STRIPPED THE DEFENDANTS OF THEIR FOURTH AMENDMENT RIGHTS WITHOUT EVEN A SEMBLANCE OF DUE PROCESS.

In Stone v. Powell, 428 U.S. 465, 95 S.Ct. 3037 (1977) this court held that the state must provide state defendants with "an opportunity for full and fair consideration" both at trial and on direct appeal id. 95 S.Ct. at 3083. Under the standards set forth in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963) the merits of the factual dispute were not addressed or resolved in the trial or appellate court, the state factual determination is not supported by the record as a whole and the fact finding-procedure employed by the state courts was not adequate to afford a full and fair hearing.

In Georgia the burden of proof is upon the state at a Motion to Suppress hearing. Grey v. State, 145 Ga. App. 293 (1978). In basing its previous ruling on Ledesma v. State, #39691 (9/7/83) this Georgia Supreme Court overlooked that in the previous case that it relied upon it was never established where the calculator and ledger were found. Nor was the alleged ledger even referred to in the previous case. Thus the state failed to meet its burden of proof as to the ledger. Therefore this case must be reversed on this point alone. Moreover these issues could not have been and were not litigated in the previous case. See Grey v. State, 145 Ga. App. 293 (1978).

The failure to grant the Petitioners an evidentiary hearing on the Motion to Suppress was error requiring reversal of

conviction. OCGA 17-5-30 (Ga. Code Ann. 27-313), providing that after the motion to suppress has been filed, "(t)he trial judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion" (Emphasis supplied). "Failure to hold this mandatory hearing was error, and the error was preserved by the appellant's objection to admission of the evidence sought to be suppressed." Grey v. State, 145 Ga. App. 293 (1978). It should be noted that neither in this case nor in the previous case relied upon by the State was it ever established where the calculator, tapes and ledger were found. Collateral Estoppel does not apply here, as Defendant had a right to relitigate the same search at a subsequent trial. People v. Plevy, 417 N.E. 2d 518 (N.Y.

1980).

The Sixth Amendment provides that "the accused shall enjoy the right... to be confronted with the witnesses against him." Accord, Georgia Constitution of 1976, Art. I, Sec. I, Par. XI. This right of confrontation carries with it the right to cross examine and both are fundamental rights of the accused binding upon the State by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1964). A complete denial of cross-examination is "constitutional error of the first magnitude." Brookhart v. Janis, 384 U.S. 1, 3 86 S.Ct. 1245 (1966). "The right of cross-examination, thorough and sifting, shall belong to every party as to the witnesses called against him. If several parties to the same case shall have distinct interest, each may exercise

this right." OCGA 24-9-64 (Ga. Code Ann. 38-1705). Even an undue abridgement, short of a complete denial as is the case here, is grounds for reversal of a conviction. Ledford v. State, 89 Ga. App. 683 (1964); Holt v. State, 2 Ga. App. 383 (1907).

Moreover the transcript itself is not sufficient to sustain the State's burden of proving the search and seizure was lawful. In Lisky v. State, 156 Ga. App. 45, 46 (1980), the court reversed where the State's case rested solely on oral testimony without supporting documentation. Here the documentation was not the warrant or affidavit but the alleged teletype which was never entered into evidence in this case and is not part of the Record. Cf. Bland v. State, 141 Ga. App. 858 (1977);

"The record before us does not contain the search warrant or the affidavit on which it was issued; consequently the only information contained in the record is the testimony presented at the hearing on the motion to suppress. This testimony did not contain sufficient facts to sustain the State's burden of proof."

As argued infra the warrants and their supporting documentation were relevant in that the Petitioners here challenged the officers scope of the execution of the searches and seizures under the warrant were an unconstitutional delegation of authority and showed on their face they were based on illegal wiretaps. Moreover without even examining these documents the Supreme Court of Georgia admitted it upheld the searches based on the trial courts consideration of

"the search warrant and supporting affidavits in determining there was sufficient probable cause to authorize the searches." (Slip Opinion page 6, App. 14a).

. . Moreover the Supreme Court of Georgia had absolutely no jurisdiction over this case and should have transferred it to the Georgia Court of Appeals as jurisdiction was conferred upon the by Article VI, Section II, Paragraph IV of the 1976 Constitution of the State of Georgia. The Georgia Supreme Court did not give any excuse for its violation of the state constitution.

IV THE SEIZURE OF PETITIONER LEDESMA'S PERSONAL PAPERS (THE DRUG LEDGER) DURING HER WARRANTLESS ARREST ON AN UNRELATED CHARGE VIOLATED THE FOURTH AMENDMENT PRESCRIPTION AGAINST UNREASONABLE SEARCHES, WAS THE PRODUCT OF AN ILLEGAL ARREST, AN ILLEGAL INVENTORY SEARCH AND AN ILLEGAL WEAPONS SEARCH.

The September 14, 1982 seizure of the drug ledger, calculator and tapes, that were all admitted at trial was illegal for several reasons besides the failure of the state to meet its burden of proof. This evidence was the fruit of an illegal arrest, an illegal inventory search and an illegal pat-down search. Moreover even if the search were legal the state had no right, as argued in Division I infra and incorporated herein by reference, to seize personal papers as the "drug ledger" clearly was. This ledger consisted solely of names with numbers beside them.

The trial court ruled the teletype veri-

fied the existence of a warrant, the Supreme Court of Georgia found, contradictory to this, that the arrest was based on probable cause because the police had a right to assume a warrant would follow the teletype. The teletype the arresting officers received did not say there was a warrant, or that it would be followed by a warrant. In fact, there was no warrant, nor was the defendant "charged in the courts of a state with a crime." Nor did a warrant ever issue. See OCGA 17-13-34 (Ga. Code Ann. 44-414). The Missouri officer, who sent the teletype, testified he was in contact on September 14 with Fulton County officers and he never told the Fulton officers there was a warrant. The Fulton officers waited over 10 hours after receipt of the teletype to effect the arrest of the defendant.

When an arrest is made on an alleged warrant which the officer learned about in a radio bulleting the arrest is illegal unless there is not only a warrant, but a warrant supported by probable cause. Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031 (1971). In Whiteley, the officer seized the defendant based on a radio bulleting that there was a warrant for the defendant. In fact, there was a warrant, but it was not supported by probable cause. Nevertheless, the arrest was invalid:

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest. Whiteley, supra, 401 U.S. at 568.

Here the facts are even more compelling, because there was no warrant at all; there was no communication verifying the warrant; and, unlike the arresting officer in Whiteley, the arresting officer here did have the time and resources to verify the warrant.

"The decisions of this court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." Whiteley, supra, 401 U.S. at 564. In warrantless arrest, the same standards apply for reviewing a police officer's assessment of probable cause: "(L)ess stringent standards for reviewing the

officer's discretion in effecting a warrantless arrest and search would discourage resort to procedures for obtaining a warrant. Thus the standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment. Id. 401 U.S. at 566. In Ker v. California, 374 U.S. 23, 83 S.Ct. 1623 (1963), the Court held that the same probable cause standards for arrests were applicable to state arrests. "An arrest and search, legal under federal law, are legal under state law." Durden v. State, 250 Ga. 325, 327 (1982).

The decisions of the courts of Georgia have previously adhered to the

Even a warrant which on its face shows it is not supported by probable cause is illegal and will not support an arrest or search subsequent to the arrest. Good v. State, 127 Ga. App. 775, 776 (1972).

Neither the Fulton County officers nor the Missouri officer complied with the Uniform Criminal Extradition Act. OCGA 17-13-1 et seq. The agreement must be strictly complied with as the language is "mandatory." United States v. Ford, 550 F.2d 732, 744 (2nd Cir. 1977), aff'd 436 U.S. 340, 98 S.Ct. 1834 (1978). The officers did not have any information that the Petitioner was "charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year," (as the Supreme Court conceded

(Appendix A, ps. 8a)) and the Missouri officer had no warrant or charge pending. Police "bookings" for "investigation" and "on suspicion" are illegal. Collins v. United States, 289 F.2d 129 (5th Cir. 1963); Staples v. United States, 320 F.2d 817 (5th Cir. 1963). Extradition arrests cannot be made on a lesser basis than Fourth Amendment probable cause. Kirkland v. Preston, 385 F.2d 670 (D.C. Cir. 1967). "But when the extradition papers rely on a mere affidavit, even where supported by a warrant of arrest, there is no assurance of probable cause unless it is spelled out in the affidavit itself." Id., at 676.

The facts of the case here are similar to Batton v. Griffin, 240 Ga. 450 (1978). There the court found: "No arrest warrant or indictment accompanied the requisition, only two 'Juvenile Petitions' and 'Deten-

tion Orders.' So far as we can tell, no determination of probable cause to arrest Petitioner was made by any magistrate in North Carolina, and none is necessary for the issuance of these documents under the law of that state." Id., 450, 451. The court found the arrest illegal, saying "No arrest warrant was issued, and no indictment was returned." Id, at 252. The court ruled theprocedure employed by the demanding state to be constitutionally deficient because, as here, the procedure "does not require any determination of probable cause to arrest as a prerequisite" to the arrest. Id., at 252. Missouri's "hold 20" procedure is no different from the North Carolina juvenile hold procedure condemned in Batton. The Missouri procedure also closely resembles the procedures condemned in Staples, supra, and

Collins, supra. Similarly, in Ierardi v. Gunter, 528 F.2d 929, 931 (1st Cir. 1976), that court held that a prosecutor's information, certainly more reliable than the teletype, unsupported by any further evidence of probable cause, is insufficient to support an arrest.

The arrest and search must fail also because the State has failed to show the second prerequisite for an arrest under OCGA 17-13-34 (Ga. Code Ann. 44-414). That second prerequisite is that the defendant has fled from justice. See Bearden v. State, 223 Ga. 380, 382 (1967). Indeed the court in Batton, supra, at 452, found that "further flight" was a precondition of the use of OCGA 17-3-34 to support an arrest. In Wisconsin v. Hughes, 229 NW2d 655, 661 (Wis. S.Ct. 1975), that court held that there were two ele-

ments necessary to support an arrest under this section of the Extradition Act.: "That the defendant is charged with a crime under the laws of another state and that he is a figitive from that state." Here, neither element is present. Whatever the requirements of the Extradition Act, an arrest must always meet the probable cause standard: "(A)n arrest is constitutionally valid if, at the moment the arrest is made, the facts and circumstances within the knowledge of the arresting officer and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the accused had committed or was commiting an offense." Durden v. State, 250 Ga. 325, 326 (1982), citing Beck v. Ohio, 379 U.S. 91, 85 S.Ct. 223 (1964).

Well established case law precludes a finding that the search subsequent to the illegal arrest should be allowed based on the "good faith" exception. See Whiteley, supra, 401 U.S. at 568: "(t)he Laramie police were entitled to act on the strength of the radio bulletin...but an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."

In Berry v. State, 163 Ga. App. 705, 711 (1982), that court noted the Georgia courts have never recognized the "judicially legislated 'good faith' exception to the judicially created 'exclusionary rule,'" created in United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

Moreover, the Fifth Circuit has ex-

pressly stated that the good faith exception does not apply to the facts of this case. See United States v. Garcia, 676 F.2d 1086, 1094 (5th Cir. 1982):

> It is not this Court's role to engraft a "good faith" exception onto Texas jurisprudence. Thus in this case, where an arrest was unlawful under Texas statutes, the game warden's good or bad faith can have no bearing on our decision to exclude the illegally obtained evidence.

But if, as here, the officer's actions violated the defendant's clearly established constitutional rights, there is no good faith exception. Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982): Wood v. Strickland, 420 U.S. 308 (1975). An arrest by warrant based on probable cause is a clearly established right as argued infra. Furthermore, the burden to establish the good faith defense was on the State. Williams, supra, 622 F.2d at 847.

Although the State relies on the "reasonable information" section of the statute in question, the officers testified they relied not on the statute but on the teletype which they believed constituted notice of an outstanding warrant. In fact, the teletype did not say there was a warrant, nor was there any communication that there was a warrant. Therefore, the good faith exception must fail as the actions of the officers were not based upon any specific statutory authorization, case law, or other legal authority as envisioned in Harlow v. Fitzgerald, supra.

Assuming the arrest was legal the search which yielded the gun and possibly the evidence admitted here was beyond the scope of a search incident to an arrest. Belton v. New York,

453 U.S. 454, 101 S.Ct. 2680 (1981). A search incident to arrest is limited to the immediate area where the defendant is at the time of the arrest. Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881 (1964). The defendant here was a lone forty-year old woman. She was already out of the car when she was arrested. Three policemen effectuated the arrest. At the time of the search of the passenger compartment one officer had the defendant up against the police car, if not in the police car. The arrest was for an out of state charge and the state made no claim that the search was for evidence related to the offense for which the arrest was made. Cf. Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034 (1969).

In Belton, supra, the Court identified several factors for determining whether a

search of the passenger car is within the scope of the arrest. Those factors are not present here. The passenger compartment was not within the reach of the arrestee as the defendant was up against the police car or actually in the police car. Here there was no suspicion that there were drugs or contraband in the car. Here there were three policemen and one arrestee as compared to the one officer and four arrestees in Belton.

Moreover the gun was found in a closed container. "A search incident to arrest does not authorize the police to search closed containers which do not reveal their contents or dispose them to plain view." United States v. Ross, U.S. , 102 S.Ct. 2157, 2167 (1982). "(A) warrant is generally required before personal luggage can be searched, and the

extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." Arkansas v. Sanders, 442 U.S. 753, 764 fn.13, 99 S.Ct. 2586 (1976).

If the impoundment search of an automobile is unreasonable, the inventory search which follows it is invalid. Arkansas v. Sanders, supra; State v. Ludvicek, 147 Ga. App. 784 (1976). Before the need for a legitimate inventory search can arise, the police must have the right and authority to take control of the vehicle. United States v. Staller, 616 F.2d 1284, 1289 (5th Cir. 1980), cert. denied. U.S. , 101 S.Ct. 207 (1980). The automobile was legally parked before the officer stopped it or approached it. The

officers knew that the car was owned by the defendant and her husband. The officers knew that the defendant had just left her mother's house which was one and a half miles away. The officers admit they did not ask the defendant what she wanted done with the car. An impoundment is not necessary where "the evidence affirmatively shows that (the) automobile was safely parked off the street, that it had not been used to store or carry drugs, nor had it been involved in the drug sale in any way." Dunkum v. State, 138 Ga. App. 321, 325 (1976). Accord United States v. Nelson, 511 F. Supp. 77, 81 (W.D. Tex. 1980). "Where the officer knows the identity of the owner in question, he should make at least a reasonable effort to determine the owner's wishes regarding dis-

position of the vehicle and that only after such reasonable is made should the necessity of impoundment attach." State v. Darabis, 159 Ga. App. 121, 123 (1981).

Furthermore, the second impoundment search at the police station was illegal in that it was done without a warrant. Arkansas v. Sanders, 442 U.S. 753, 762 (1979). Certainly opening the pill bottle was beyond the scope of the inventory search. United States v. Bloomfield, 594 F2d 200 (8th Cir. 1979).

As argued above, the rules and regulations of the Fulton County Police Department are not the authority envisioned in United States v. Williams, supra, and Harlow v. Fitzgerald, supra, to support the good faith exception. Although the trial court upheld the impoundment

search based only on the good-faith exception the Georgia Supreme Court simply said the impoundment search was authorized without giving any reason whatsoever.

CONCLUSION

As argued above the state has shown no exception to the Fourth Amendment that authorizes police officers to conduct the massive searches through personal papers that were done in this case. Inasmuch as these personal papers were seized under OCGA 17-14-7(f) this case is controlled by Waller v. Georgia, Case No. 83-321, cert. granted 11/7/83. For these and the other reasons argued above this Court should grant the writ.

J.M. Raffauf
Attorney for Petitioner
1477 Snapfinger Road
Decatur, Georgia 30032
(404) 288-0289

APPENDIX A

In the Supreme Court of Georgia

Decided: January 5, 1984

40227. LEDESMA, et al v. STATE

40315. MERRITT v. STATE

GREGORY, Justice.

Miriam Billings Ledesma and Wesley Merritt were convicted of conspiring to sell cocaine in violation of the Georgia Controlled Substances Act. The indictment charged that appellants, along with three other named individuals, "from the 22nd day of June 1982 through the 22nd day of October 1982, did unlawfully conspire to violate Schedule II of the Georgia Controlled Substances Act by joining among themselves and others to sell cocaine, and certain members of such conspiracy did sell cocaine in violation of Schedule II of the Georgia Controlled Substances Act." The three co-defendants

entered guilty pleas; two of them, Wesley Freeman and Joseph Downing, testified against appellants at trial.

(1)(a) Appellants argue the trial court erred in denying their motions for directed verdicts of acquittal. OCGA 17-9-1. Appellants maintain the State's evidence failed to prove a conspiracy took place within the time frame alleged in the indictment. "In proving the time of the commission of an offense the State is not, as a general rule, restricted to proof of the date alleged in the indictment but is permitted to prove its commission on any date within the statute of limitations." Grayson v. State, 39 Ga. App. 673 (148 SE 309) (1929); Price v. State, 247 Ga. 58, 59 n. 1 (273 SE2d 854) (1981). Where, however, the indictment specifically alleges the date of the offense is material, the accused may be convicted only

if the State's proof corresponds to the date alleged. Bloodworth v. State, 128 Ga. App. 657 (197 SE2d 423) (1973); Price, supra. The indictment in this case did not allege the dates of the offense were material. We hold that so long as the evidence shows the existence of a conspiracy as alleged, the State may offer any evidence relevant to the conspiracy during the statutory period of limitations.[1]

Here, the State's evidence showed that in May, 1982 Derrick Brown committed an armed robbery in which appellant Ledesma's purse was taken. Following Brown's arrest police recovered the purse. Inside it they found a ledger cataloging drug-related transactions and a record of monies owed her by persons to whom she supplied drugs. At the trial of this case Brown testified that he had observed Ledesma

"cutting cocaine" on a number of occasions between December, 1981 and March, 1982. Brown also admitted Ledesma had been his "source" for cocaine since December, 1981.

Co-defendant Wesley Freeman testified "in the summer of 1982" he received drugs, which he subsequently sold, from co-defendant Joseph Downing. According to Freeman, appellant Ledesma supplied these drugs to Downing. Freeman further testified that "in September or October" of 1982 he observed appellant Ledesma supply drugs to co-defendant Delores Snead; Snead, in turn, gave a portion of these drugs to Freeman to sell.

Co-defendant Joseph Downing testified that appellant Ledesma supplied the drugs which he sold. He also testified that in September or early October of 1982[2] he heard Wesley Freeman telephone appellant

Merritt to arrange for the delivery of a package of cocaine.

Both Downing and Freeman admitted selling cocaine during the alleged time of the conspiracy. At least one sale by Freeman was corroborated at trial by the testimony of an undercover police officer.

An October 23, 1982 search of the Wes-Mer Chemical Company, in which appellants Ledesma and Merritt were corporate officers disclosed substantial drug paraphenalia and numerous plastic bags containing cocaine residue. In Ledesma's desk police found a drug-testing apparatus and ledgers recounting drug transactions. The trial court did not err in denying the motion for directed verdict of acquittal. The evidence showed an established organization, headed by Merritt and Ledesma, which conducted seminars in drug sales techniques and supplied cocaine to middle-

men who, in turn, provided it to others for sale "on the street." This evidence meets the standard set forth in Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

(b) Nor did the trial court err in denying appellant Merritt's motion for directed verdict on the ground that the testimony of accomplices Downing and Freeman was uncorroborated. Where two or more accomplices testify at trial, the testimony of one accomplice may be corrorobated (sic) by the testimony of the other. Eubanks v. State, 240 Ga. 544(1) (242 SE2d 41) (1978). The drug paraphenalia recovered from Wes-Mer Chemical Company and evidence showing Merritt's association with two drug couriers provided additional corroboration, thus satisfying the requirement of Birt v. State,

236 Ga. 815 (225 SE2d 248) (1976).

(2) Following the May, 1982 armed robbery of her home, Ledesma reported the incident to the police, including the fact that her purse had been taken by the robber. She identified Derrick Brown as the robber and gave police a description of him. Police subsequently apprehended Brown who led them to a wooded location where he had hidden Ledesma's purse. According to police testimony, the purse was inventoried for use in the armed robbery charge against Brown; the officer conducting the inventory testified that it was police procedure to inventory recovered stolen property. During the inventory police discovered ledgers detailing drug transactions.

Prior to the trial of this case Ledesma filed a motion to suppress these drug ledgers. The trial court denied the

motion and the ledgers were admitted in evidence. We find no Fourth Amendment violation. The police recovered property which Ledesma reported stolen. A routine police inventory was conducted to determine whether the purse, in fact, belonged to Ledesma and whether the currency Ledesma had reported was in the bag remained there. The police were in lawful possession of Ledesma's purse, and it was proper to make a good-faith inventory of the contents. See, Johnson v. State, 23 Ariz. App. 64 (530 P2d 910) (1975). We hold that this search and seizure was reasonable under the Fourth Amendment.

(3) Appellants argue the trial court erred in denying Ledesma's motion to suppress evidence seized in a search of her car pursuant to an arrest on September 14, 1982. As a result of this arrest Ledesma was convicted of possession of a

firearm and violation of the Controlled Substances Act. This court affirmed, finding the motion to suppress was properly denied. Ledesma v. State, # 39691 (Decided September 7, 1983).

Prior to the trial of this case Ledesma renewed her motion to suppress the evidence seized as a result of the September 14 arrest. The trial court[3] declined to put the State to its proof a second time, but permitted appellants the opportunity to call witnesses or otherwise offer evidence which would raise issues different from those raised in the first motion to suppress. Appellants declined to do so. We find no error.

(4) Appellant Merritt argues the trial court erred in refusing to charge the jury that a witness may be impeached by proof of his conviction of a crime of

moral turpitude. The trial court instructed the jury that a witness may be impeached by contradictory statements or by disproving facts he has testified to.

Over the State's objection appellant was permitted to elicit responses from Joseph Downing and Wesley Freeman that each had prior felony convictions. Appellant did not offer the records of these convictions in evidence. This court has held, for the purposes of impeachment, the prior conviction of an adverse witness cannot be shown by cross-examination of the witness. To impeach a witness by a prior conviction the conviction must be proved by the record of conviction itself, not by cross-examination. Timberlake v. State, 246 Ga. 488, 499 (271 SE2d 792) (1980). Even though the trial court erroneously allowed appellant to question the wit-

nesses about past felony convictions, appellant is not entitled to the requested charge on impeachment because he failed to offer the proper evidence which would be the records of conviction.

(5) Appellants argue that their character was impermissibly placed in evidence twice during trial. Motions for mistrial were made in each instance and denied by the trial court.

(a) When asked by the State "in what capacity" he had ever seen Ledesma in the company of a drug courier known as "NeNe", Derrick Brown replied, "Just large quantities of marijuana." Appellants argue this put Ledesma's character in issue by bringing in evidence of an unproved crime. Brown's statement was, however, relevant to prove Ledesma's association with a drug courier whom the State linked to the

conspiracy. "Evidence relevant to an issue in the case is not rendered inadmissiable because it may incidentally impugn the character of an accused where character is not otherwise in issue." Duck v. State, 250 Ga. 592, 598 (300 SE2d 121) (1983).

(b) On direct examination the State asked the officer who arrested Ledesma on September 14, 1982 to identify calculator tapes taken from Ledesma's purse "without going into the reason for the investigation" leading to his possession of her purse. These calculator tapes contained "names and figures" which the State argued were linked to drug transactions made in furtherance of the conspiracy. On cross-examination this officer was asked if Ledesma consented to the search of her purse. The officer answered, "she was under arrest at the time, counselor."

Ledesma argues the officer's statement improperly introduced evidence of another crime and was unresponsive to her question. The trial court found that the question had been asked to suggest a lack of authority to examine Ledesma's purse, and that the officer's explanation of his investigation was admissible. "Under the facts set forth we do not think that the trial court erred in overruling the... motion for mistrial. The answer complained of (was) responsive to questions propounded by the defense consel... A trial court does not commit error by failing to strike answers which are responsive or which explain responsive answers." Lemon v. State, 235 Ga. 74 (218 SE2d 818) (1975).

(6)(a) Appellants argue the trial court erred in denying their motions to suppress evidence seized in three searches conducted in October, 1982. It is not disputed that electronic surveillance was used to gather information which, in part, established probable cause for the warrants used to execute these searches. Appellants maintain the affidavits used to support the authorization of the wiretaps were insufficient as a matter of law. They insist this insufficiency renders the search warrants invalid.

The trial court conducted a hearing on this motion to suppress, considering the affidavits used to support the issuance of the wiretaps and receiving testimony from the trial judge who authorized the electronic surveillance in this case. Thereafter the trial court ruled that the

wiretaps were lawful. Appellants have not demonstrated to this court in what respect the evidence before the authorizing judge was insufficient. Absent a showing of error to this court, the judgment of the trial court is presumed to be correct. Miller Grading Contractors, Inc., v. Ga. Federal Savings & Loan, 247 Ga. 730 (279 SE2d 442) (1981); Watson v. Stynchcombe, 240 Ga. 169 (240 SE2d 56) (1977)

(b) Appellants argue that evidence obtained from the electronic surveillance was not properly sealed as required by OCGA 16-11-64 (b)(8). Pretermitting a resolution of the merits of this issue, we note that the remedy for a violation of this section is to render the wiretap evidence inadmissable. See Cox v. State, 152 Ga. App. 453 (263 SE2d 238)

(1979). As appellants concede no wire-tap evidence was admitted at trial, we find no error.

(7)(a) Appellants next make a number of inter-related attacks on OCGA 17-5-21, which sets forth the scope of a search pursuant to a warrant, and OCGA 16-14-7(f) which authorizes the seizure of property subject to forfeiture under the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO).

According to appellants, a number of their "private papers" were seized in violation of OCGA 17-5-21 and the Fourth Amendment to the United States Constitution during the October, 1982 searches. These papers consisted of ledger reciting drug transactions; two desk calendars recounting drug transactions and the name of a drug courier; deposit slips for Wes-Mar

Chemical Company found at appellant Merritt's real estate business; a business license of Wes-Mer Chemical Company; and an employment contract between a third party and Wes-Mer Chemical Company. Both the business license and contract denominated appellant Merritt as a corporate officer in Wes-Mer Chemical Company, and both were found during the search of Merritt Realty. Appellants maintain the scope of the search warrants did not extend to the seizure of these papers. These search warrants were not offered in evidence and are not a part of this record.

Appellants submit that these papers were seized under the purported authority of OCGA 16-14-7 which permits the seizure of "all property of every kind used or intended for use in the course of...

a pattern of racketeering activity..." Appellants insist that this statute conflicts irreconcilably with both OCGA 17-5-21 and the Fourth Amendment which, appellants argue, do not permit the seizure of private papers in absence of a warrant authorizing their seizure. We point out that OCGA 17-5-21 does not preclude the seizure of private papers not listed in the warrant where those papers are the instrumentalities of a crime and the search is otherwise valid. Tuzman v. State, 145 Ga. App. 761 (244 SE2d 882) (1978), cert. den. 439 U.S. 929 (99 SC 317, 58 LE2d 323). Nor does the Fourth Amendment preclude the seizure of private papers under these circumstances. U. S. v. Couch, 648 F2d 938 (CA 4 1981), cert. den. __U. S.__(102 SC 491, 70 LE2d 259) (1981); Louie v. U. S., 426 F2d 1398

(CA 9) (1970), cert. den. 400 U. S. 918 (91 SC 180, 27 LE2d 158); 70 ALR2d 1005.[4] Furthermore, we hold that these documents are not private papers. See, McCormick, Evidence (2d Ed.), 170, pp. 380-381. See also, LaFave, Search and Seizure, 2.6(e), pp. 395-8. Appellants concede that these papers could have been seized under the broad reach of OCGA 16-14-7(f). As we have determined that the seizure of these papers contravened neither OCGA 17-5-21 nor the Fourth Amendment, we do not find the conflict urged by appellants.

(b) This court has upheld the RICO statute against the facial constitutional attack made here. Waller v. State, 251 Ga. 124 (___SE2d___) (1983). There is no merit to appellants' contention that this statute gives law enforcement officers

unbridled discretion to search for evidence of illegal activity.

(8) The record indicates that at the hearing on the motion to suppress evidence obtained in the October, 1982 searches, the trial court considered the search warrants and supporting affidavits in determining there was sufficient probable cause to authorize the searches. The failure to put the search warrants in evidence is not reversible error where appellants have not shown harm. Merritt v. State, 121 Ga. App. 832 (175 SE2d 890) (1970).

(9) We have carefully examined appellants enumerations of error regarding the correctness of the trial court's charge and find them to be without merit.

(10) Following their convictions in February, 1983, appellants filed motions for appeal bond. The trial court denied

the motions finding a substantial likelihood existed that appellants would commit other crimes if released. Birge v. State, 238 Ga. 88 (230 SE2d 895) (1976). In their briefs appellants state that they timely filed notices of appeal from this decision, but later withdrew them. An appeal of this issue is now untimely.

(11) In case # 40227, appellant Merritt appeals from the denial of a subsequent motion for appeal bond. That case is dismissed as moot.

Judgment affirmed. All the Justices concur, except Weltner, J. not participating in case # 40315.

APPENDIX B

In the Supreme Court of Georgia

January 31, 1984

40227 Ledesma v. State

We have considered the merits of defendant Ledesma's motion for rehearing and find them lacking. Ordinarily we simply would deny the motion. However, we have also considered the offensive language of the motion which is so unnecessarily censorious of our opinion and counterproductive of the orderly judicial process, we elect to dismiss.

Motion dismissed.

ENDNOTES

1/ We point out that our holding here does not alter OCGA 24-3-5, which provides "After the fact of conspiracy is proved, the declaration by any one of the conspirators during the pendancy of the criminal project shall be admissible against all."

2/ Downing testified that this conversation occurred "five or six months" prior to trial. Trial commenced on February 9, 1983.

3/ The record indicates the trial judge who ruled on the first motion to suppress heard Ledesma's motion to suppress in this case.

4/ For a discussion of Fourth Amendment implications where the papers seized are not instrumentalities of a crime, see Lafave, Search and Seizure, 2.6(e), pp. 391-399.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this petition, by mail upon:

Hon. Michael Bowers
Attorney General of Georgia
132 State Judicial Bldg.
40 Capitol Square SW
Atlanta, Georgia 30334

and

Hon. Ben Oehlert
Assistant District Attorney
300 Fulton County Courthouse
136 Pryor St. SW
Atlanta,Georgia 30303

This the ___ day of March, 1984.

J.M. Raffauf